Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

BRIAN WALLACE, ADMINISTRATOR OF
THE ESTATE OF NORMAN WALLCE,
Petitioner,

v.

CASE WESTERN RESERVE UNIVERSITY,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio Eighth Appellate District

PETITION FOR WRIT OF CERTIORARI

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March 30, 2010

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QUESTION PRESENTED

Does the Ohio rule articulated in Reitz v. Macy Co. Department Store, 66 Ohio App. 3d 188 (1990), and adopted by the Ohio Supreme Court in this action, usurp the role of the jury and violate the Seventh Amendment right to a jury trial? Specifically, under Ohio law, before a wrongful death action proceeds to a jury, a judge must determine whether the fatal harm to the decedent, a business invitee, was reasonably foreseeable to the business owner under a totality of circumstances test, with the totality of circumstances being "somewhat overwhelming," an extremely vague and imprecise standard.

This case emanated from the May 9, 2003, nationally publicized shooting rampage at the Weatherhead School of Management, in the Peter B. Lewis building, on the campus of Case Western Reserve University ("CWRU" or "the University"). On that date Biswanath Halder, a former student of CWRU's Weatherhead School, entered a classroom building and shot to death Norman E. Wallace, a thirty year old graduate student.

As is characteristic of such rampage shootings at our country's educational institutions, this was not a random act by Halder. The true tragedy is that his rampage was foreseeable and preventable – by CWRU. There had been clear warning and notice to CWRU in June 2002 that if Halder lost his civil case regarding the intentional destruction of his computer files against a CWRU employee on appeal, he was "going to fuck those fuckers up" and kill people at the Weatherhead School. Halder made this threat of death while he displayed the hand gesture of shooting

with a gun which was then communicated to CWRU, thereby placing it on actual notice of his death threat, and giving rise to a concomitant duty to protect students, staff and faculty.

Halder was a clear and present danger, known by CWRU and its Weatherhead School since about 1999. The record below established that Halder had engaged in a protracted legal dispute with CWRU right up until the time of the shooting of Mr. Wallace. The record further established that CWRU did not treat Halder's claim seriously. On April 29, 2003, the Eighth Circuit Court of Appeals dismissed Halder's appeal of the dismissal of his lawsuit. A few days later, Halder carried out his threat as promised, by going on a shooting rampage at the Weatherhead School.

This case merits the attention of this Court because the public has a very great and understandable interest in seeing that educational institutions in Ohio will not ignore the safety of their students, staff and faculty when these institutions are put on notice of death threats and substantial dangers, like those that Petitioner demonstrated existed in this case when his decedent was gunned down. The holding of the Ohio Supreme Court affirming summary judgment for CWRU on the grounds that it had no duty because Halder's actions were not foreseeable jeopardizes campus safety throughout the United State. This decision is not only contrary to the national trend in campus rampage shootings, but it turned a blind eye to the wealth of evidence which showed CWRU was put on notice of the real and substantial threat Halder, a former graduate student, posed. Ohio courts of appeals are split on the appropriate test for foreseeability in a premises liability case based on

criminal conduct, and this Court has not yet had occasion to adopt a standard for academic institutions. Until this Court clarifies the foreseeability standard and provides guidance for its proper application in an academic setting, school administrators will assume that they need do nothing to protect students, staff and faculty even in the face of clear death threats.

PARTIES

Petitioner is the Estate of Norman Wallace. Respondent is Case Western Reserve University.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court.

OPINIONS BELOW

Court of Common Pleas Journal Entry and Opinion (August 27, 2008)

Court of Appeals of Ohio Journal Entry and Opinion (July 30, 2009)

Supreme Court of Ohio Entry Declining Jurisdiction (December 30, 2009)

JURISDICTION

The judgment of the Ohio Supreme Court was entered December 30, 2009. The jurisdiction of this Court is based on 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in this case, U.S. Const. amend. VII and 28 U.S.C. § 1257, are reproduced in Appendix D and Appendix E, respectively.

STATEMENT OF THE CASE

This case arises from a wrongful death and survivorship action predicated on premises liability and negligence theories from the Mary 9, 2003, shooting death of Norman E. Wallace, a graduate student at CWRU's Weatherhead School of Management. The shooting occurred in the Peter B. Lewis Building. Norman was a 2004 candidate for a Master's in Business Administration. He was a student leader and the only African American male in the class of 2004, as well as a longtime academic standout and newly elected president of the Black MBA Student Association. The underlying action was filed by the executor of Norman's estate, his brother Brian, one of Norman's ten siblings. Norman was a product of the Mt. Calvary Pentecostal high school and had earned a Bachelor of Science degree in business administration from Youngstown State University in 1996.

From 1996 to 1999 Biswanath Halder was enrolled as a graduate student at the CWRU Weatherhead School of Management. After his graduation in 1999, Halder continued his studies at CWRU by enrolling in the MBA Plus program for the fall 1999 and spring 2000. As part of his studies, he used the computer lab on CWRU's campus. Halder was known to cause problems in the computer lab. On occasion, Halder logged onto up to three computers in the lab at one time, thereby preventing computer access to other students. On another occasion, a female student complained that Halder was harassing her in the lab, insisting she proofread his personal documents. In July 2000, Halder discovered that his email account had been hacked into, and all his computer files had

been deleted. Halder accused Shawn Miller, a computer technician employed by CWRU, as the individual whom he believed had hacked into his computer and deleted his life's (intellectual) work

In June 2001, Halder sued Shawn Miller in the Cuyahogo County Court of Common Please, claiming he hacked into Halder's website. CWRU, even though not a party to the matter, provided a defense for Miller since the incident was directly related to his employment with CWRU, and Miller also counterclaimed for defamation of character and intenetional inflciton of emotional distress. When Miller was sued, he spoke to Marion Hogue, Dean of Students at CWRU. Hogue had CWRU defend Miller and fight Halder's claims, and referred Miller to the University's legal counsel. Hogue did not provide any counsel or assistance to Halder even though a CWRU personnel had destroyed his files.

Halder was a pro se litigant for much of his case, giving him direct personal involvment with the University attorneys. Halder also continued to live at the same address, near many CWRU students, and he discussed it with his neighbors, CWRU law students, who in turn discussed it with other CWRU students and employees. Rather than undertake an approprate investiagation of Halder's accusations that a CWRU employee had destroyed his lifes work, CWRU wrote Halder a letter in Novermber 2001 abruptly terminating his computer lab privileges over a spam email that Halder did not send. In May 2002, the Universtiy also successfully fought Halder's motion to compel discovery and his motion to add the University as a defendant. In January 2003, at Miller's behest, the court ordered Halder to delete statements from his

website – a further loss of Halder's intellecutual work – in a way that he thought denied his due process. In Febuary 2003, when Miller's lawyer was insisting on Halder's compliance, he protested to the court that he had been misinformed about his opportunty to respond.[1]

Significantly, CWRU also knew its employees had **actually** hacked into Halder's website and **intentionally** provoked him. The record on summary judgment established that Chris Fenton, manager of the Weatherhad computer lab, and his girlfriend, Janis Kaghazwala, also a CWRU employee, had asserted their privilege against self incrimaintion at Halder's criminal trial in response to questions concerning whether they had hacked into and destroyed Halder's website or posted derogatory information concerning Halder on his website. Knowledge of this intentional provocation of Halder was imputable to CWRU, although the trial court and court of appeals failed to do so.

In May 2002, while Halder was struggling to add CWRU and other defendants to his lawsuit, Halder told CWRU law student Paul Helon that if he lost the court battle he would "fuck those fuckers up." Halder even clearly made a gesture with his hand as a gun, showing he was going to shoot the people at CWRU Weatherhead School if he lost his appeal. Helon was

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[1] The critical point is that even though Halder was no longer physically present on campus, the contact between Halder and his institution enemy was substantial, ongoing and recent. In fact during oral argument in the Court of Appeals counsel for CWRU stated CWRU is an inner city urban campus and Halder resided within in area directly adjacent to CWRU.

so concerned for Miller's safety that he sought out Miller and told him about Halder's threat. Miller then reported the threat to his CWRU supervisor Roger Bielefield,[2] saying "apparently Halder is interested in killing us." Bielefield merely told Miller not to worry and that Haldier "probaby would not do anythng." However, Miller's concern for his safety did not dissapate.

Although Bielefeld received a letter from Halder, he met only once with Halder. Bielefeld provided Halder with absolutely no investigatory informaton Halder requested of him. Bielefeld also received an August 27, 2000 email from Halder broadcast to the University at CWRU stating that the "evil man" Shawn Miller, an employee of CWRU Weatherhead School, deleted in a few seconds everything it took Halder a lifetime to create.

Since the death threat by Halder was prefaced on Halder losing his civil appeal in his case with Miller which was being defended by CWRU, Miller's concern for his safetly dramatically elevated in late April 2003 when Halder lost his appeal. At that time Miller was so concerned Halder would try to seriously physcially harm him, that he even went to his residential police force, the Cleveland Heights Police Department, for protection. He did this since CWRU and Bielefeld had done nothing to protect him from Halder. Miller also made his immediate supervisor at CWRU aware of these threats. Miller also told his co-worker Chris

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[2] Bielefeld is CWRU's Director of Research Computing and Information Technology at the Weatherhead School of Management.

Fenton of the Weatherhead Computer Lab of Halder's threat soon after he learned of it. Based on his review of the computer trail evidence, Miller believed Fenton was actually the person who had hacked into Halder's computer and maliciously deleted the files that contained Halder's perceived life work.[3]

Thus, many managerial, supervising, and employee personnel at CWRU were on actual notice of the direct threat of deadly harm at the Weatherhead School by Halder should he lose his civil appeal. Further, CWRU employees (Chris Fenton and Janis Kaghazwala) had acutally hacked into Halder's website and intentionally provoked Halder. However, the trial court and court of appeals failed to impute any of this knowledge and acts of CWRU employees to CWRU in connection with the courts' analysis of the facts known to CWRU at the time of Halder's rampage.

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[3] Chris Fenton lived with girlfriend, Janis Kaghazwala, who was another CWRU employee. An investigation conducted by Halder's attorney in his lawsuit against Miller uncovered the telephone number from which Halder's computer was hacked, and this number was traced to the home of Kaghazwala. In March 2002 Halder moved to join Weatherhead School of Management into his lawsuit, and attempted to compel discovery from Weatherhead. CWRU opposed both motions and both were denied. In May 2002 Halder moved to join Kaghazwala, and that motion was also denied.

During Halder's trial for murder in 2005, Miller, who admitted that he hated Halder, testified that he figured out the identity of the culprit after his deposition was taken in Halder's civil lawsuit and that he revealed Chris Fenton's name to his attorney. At the murder trial both Fenton and Kaghazwala asserted their privilege against self incrimination when asked about the hacking. After the trial, CWRU fired both of them.

REASON FOR GRANTING THE PETITION

Argument No. 1: The decision to allow a case to a jury is guided by the substantive evidence standards that apply. It is one thing for a court to determine if a party can meet its evidentiary burden. It is completely different and unconstitutional matter for a court to decide for itself which side has presented the most plausible story. The court should decide only whether the party opposing the motion has presented a plausible story. The Ohio rule, to the contrary articulated in Reitz, invades the province of the jury. See. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Under Ohio law, a business owes a duty to prevent a third person from harming another when a "special relationship" exists between the actor and the other. *Gelbman v. Second Nat'l Bank of Warren*, 9 Ohio St. 3d 77, 458 N.E.2d 1262 (1984) (adopting 2 Restatement of the Law 2d, Torts (1965) 122, Section 315(b)). Such a "special relationship" exists between a business like CWRU, and its invitee, like Norman Wallace. *See Reitz v. May Co. Dep't Stores*, 66 Ohio App. 3d 188, 583 N.E.2d 1071 (1990); *see, also, Baldauf v. Kent State Univ.*, 49 Ohio App. 3d 46, 47-48, 550 N.E.2d 517 (1988) (student's presence on university campus undisputedly accorded her status of invitee). As part of this duty to invitees, the Ohio Supreme Court has also declared that "a business owner has a duty to warn or protect its business invitees from criminal acts of third parties when the business owner knows or should know that there is a substantial risk of harm to its invitees on the premises in the possession and

control of the business owner." *Simpson v. Big Bear Stores Co.*, 73 Ohio St. 3d 130, 135, 652 N.E.2d 70 (1995). In other words, a duty exists where a risk is reasonably foreseeable. *See Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St. 3d 75, 77, 472 N.E.2d 707, 710 (1984); *see also Semadeni v. Ohio Dep't of Transp.*, 75 Ohio St. 3d 128, 661 N.E.2d 1013 (1996) (where decedent was killed by an object thrown from an overpass court held state highway department had a duty to foreseeable travelers to take adequate measures to timely install protective fencing on overpasses).

The Ohio Courts of Appeal "are split on the appropriate test for foreseeability" with respect to criminal acts of third parties. *Whisman v. Gator Invest. Props., Inc.*, 149 Ohio App. 3d 225, 234, 776 N.E.2d 1126 (2002), citing *Heys v. Blevins*, Montgomery App. No. 16291, 1997 Ohio App. LEXIS 2536 (June 13, 1997). As the *Whisman* court explained: "The totality-of-the-circumstances test takes into consideration not only past experiences but also 'such factors as the location of the business and the character of the business to determine whether the danger was foreseeable.'" *Id.*, quoting *Heys*, *citing Reitz v. May Co. Dep't Stores*, 66 Ohio App. 3d 188, 193 (1990), *jurisdictional motion overruled*, 52 Ohio St. 3d 704, 556 N.E.2d 529. "Under this test, the totality of the circumstances must be 'somewhat overwhelming' to result in a duty to protect third parties against criminal acts of others." *Whisman*, at 234, quoting *Reitz*, at 193-194. However, "under the other test, 'the occurrence of prior similar acts suggests that the danger was foreseeable.'" *Whisman*, at 234, citing *Heys*. *See, also, McKee v. Gilg*, 96 Ohio App. 3d 764, 767, 645 N.E.2d 1320 (1994) (wherein court discussed

"totality of the circumstances" and "prior similar acts" tests of foreseeability); *Haralson v. Banc One Corp.*, Franklin App. No. 97APE08-1134, 1998 Ohio App. LEXIS 1631, *appeal not allowed*, 83 Ohio St. 3d 1419, 698 N.E.2d 1007 (Apr. 16, 1998) (discussing "totality of the circumstances" and "prior similar acts" tests of foreseeability).

Petitioner respectfully submits that the existence of a duty to protect students, staff and faculty at a university from the criminal acts of others should turn on whether the university knew or should have known that the third party presented a danger to these invitees on campus. Additionally, the "'foreseeability of criminal acts will depend on the knowledge of the [university], which must be determined from the totality of the circumstances.'" *Maier v. Serv-All Maint., Inc.*, 124 Ohio App. 3d 215, 222, 705 N.E. 1268, 1272 (1997) (quoting *Feichtner v. City of Cleveland*, 95 Ohio App. 3d 388, 396, 642 N.E.2d 657 (1994).

Thus, in this case the relevant inquiry should be whether CWRU knew or should have known from the **totality of the circumstances** that Halder posed a threat of harm to its invitees, which necessarily includes their student Norman E. Wallace. This means that the court must take into account the special nature of the academic enterprise and the special nature of risk that is attendant to this enterprise. Professor Helen DeHaven, who has undertaken an in depth study of rampage shootings in higher education, made the following pertinent observations with respect to several such circumstances in this case – circumstances which neither which neither the trial court nor the court of appeals took into account in

ruling CWRU had no responsibility for Halder's rampage:

> First, the analysis...adopted by the court does not take account of the special nature of the academic enterprise, nor the nature of the risk involved. Respect for intellectual work of others is a traditional academic value about which there is a high level of consensus in the academic community. It is a necessary component of academic freedom and scholarly productivity. It is common to all academic communities, especially high-ranking research universities like CWRU. When the college or university guards and implements such a value for the scholarly community (and, in terms of the business model trades on it), it is to be expected that it will maintain professional standards of conduct and accountability in the computer labs where intellectual work is pursued. If a person's intellectual work is nevertheless deliberately destroyed [as in Halder's case], a college or university should be at least as diligent in discovering the culprits as defending against false complaints. If it negligently fails to take appropriate action, its inattention can contribute to significant disorder and dysfunction not least by disappointing the legitimate expectations of its students with respect to the safety of their work. Second, the analysis [by the trial court in granting CWRU's motion for summary judgment against Appellant] does not take into account the special risks of academic life. Scholars may become deeply disturbed over issues involving their intellectual work product.

In the [Norman E.] Wallace litigation, the University made much of the fact that Halder had no history of violent or criminal behavior and was not known to own a gun, but the same can be said of most academic rampagers, few of whom make direct threats. Guns are easy to obtain. Every rampage killer also has obtained his weapons quickly and lawfully. Murders that occur as a result of academic-related conflicts are most likely to occur at the Institution, not at the victim's home or some other place. In a rampage, innocent people are always hurt. Given the academy's experience with violent graduate students, a reasonable jury might find that a prudent college or university should take it seriously when a student with known grievances and frustrations about the destruction of his work actually threatens to kill those responsible. A jury might well find it imprudent for a school to let its employees treat threats by students as purely personal conflicts, with only personal safety implications. On the other hand, it is both prudent and consistent with a school's educational mission to discourage threatening behavior.

Third, the premises liability analysis [undertaken by the trial court in this case] elevates location over relationship in a way that does not necessarily comport with the realities of the situation. In terms of the foreseeability of his attack on the school, the analysis adopted by the court placed far greater emphasis on the fact that Halder left campus in August 2000 than on the substantial, and increasingly negative, relationship that continued through

> his litigation against the University and its personnel.

Helen DeHaven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, 35 J.C. & U.L. 503, 601-603 (2009) (footnotes omitted).

In this case, Petitioner presented a wealth of evidence in response to CWRU's summary judgment which showed CWRU actually knew and should have known that Halder posed a threat of the very danger that occurred. From nearly the beginning of his relationship with CWRU, Halder waived red flag after red flag which should have alerted CWRU to his propensity to cause harm to others. That red flag turned into a flare gun and the notice of the danger he posed was far more than "somewhat overwhelming" when Haler made his specific threat of shooting people at the Weatherhead School should he lose his appeal. Therefore, the shooting incident of May 9, 2003 was certainly foreseeable to CWRU.

Unfortunately, the trial court and the court of appeals failed to impute knowledge of CWRU's supervisory employees to CWRU in connection with both courts' analysis of the facts known to CWRU at the time of Halder's rampage. This failure was contrary to well-established Ohio law, under which knowledge of employees should be imputed to an employer if the knowledge was acquired by the employee while acting within the scope of employment. *American Fin. Corp. v. Fireman's Fund Ins. Co.*, 15 Ohio St. 2d 171, 174, 239 N.E.2d 33 (1968). Because the courts below did not adhere to this basic rule of

law, they did not take key evidence into account in ruling on CWRU's motion for summary judgment.

To summarize this evidence, the record on summary judgment established that a CWRU computer lab employee deliberately hacked the website of Halder in July 2000, while Halder was still a student in good standing at the University. Halder thereafter engaged in a protracted dispute with CWRU right up until the time of the shooting of Petitioner's decedent. Halder sent broadcast emails, filed complaints with University and law enforcement officials concerning his grievances against CWRU, and eventually filed litigation against CWRU employee, Shaw Miller. CWRU financed Miller's defense, and also successfully fought Halder's attempt to obtain discovery and join CWRU in the action. Halder communicated death threats to CWRU that were of such a disturbing nature that law student Phil Helon warned Shaw Miller, who then reported the threats to his supervisor in the computer lab. Later, upon Halder's case against Miller being dismissed, Halder's threats produced such fear that Miller requested both through CWRU and local police, additional security for his home and family. Critically, these activities occurred in close proximity – there was no "lengthy gap between Halder's last contact with CWRU in August 2000 and the shooting death of Norman Wallace in May 2003" as the court of appeals mistakenly found in concluding that Halder's actions were not foreseeable to CWRU. Court of Appeals Decision, at P40. Further, CWRU knew Chris Fenton and his girlfriend accomplice had actually intentionally provoked Halder deleting his files, because Fenton and his girlfriend's knowledge should have been imputed to CWRU.

The trial court failed to consider the foregoing evidence in opposition to the summary judgment motion. The grant of summary judgment to CWRU thus not only wrongfully deprived Appellant of his right to a jury trial, but this erroneous application of the premises liability standards threatens the safety of college campuses in this State as long as this decision stands. Accordingly, Appellant urges this Court to accept this important case for review on the merits.

Under Rule 56, all admissible evidence should be considered in opposition to a motion for summary judgment. *See Norwalk v. Cochran*, 108 Ohio App. 3d 181, 670 N.E.2d 493 (1995) (court's failure to consider all the evidence before it on summary judgment always constitutes reversible error). In *Murphy v. Reynoldsburg*, 65 Ohio St. 3d 356, 604 N.E.2d 138 (1992), the syllabus, the Ohio Supreme Court held as follows:

> Civ.R. 56(C) places a mandatory duty on a trial court to thoroughly examine all appropriate materials filed by the parties before ruling on a motion for summary judgment. The failure of a trial court to comply with this requirement constitutes reversible error.

In this case, the trial court refused to consider the affidavit of Dr. Stephen Miller on the grounds that it was expert testimony and Appellant did not provide an expert report summarizing the expecting testimony of Dr. Miller prior to the deadline set by the court under Cuyahoga County Common Pleas Court Local Rule

21.1. ("L.R. 21.1").[4] The trial court's reliance upon this rule was initially mistaken because the affidavit of Dr. Miller was used as part of motion practice, not trial. *Stewart v. Cleveland Clinic Found.*, 136 Ohio App. 3d 244, 254-255, 736 N.E.2d 491 (1999) (because L.R. 21.1 did not apply to motion practice, it did not prevent consideration on summary judgment affidavit of expert whose report that was not submitted in compliance with L.R. 21.1).

Moreover, the trial court's handling of Dr. Miller's report did not comply with Local Rule 21.1. Under that rule, a non-party expert report may be submitted up until thirty days in advance of trial. Rule 21.1(B). Here the Affidavit of Dr. Miller, a rebuttal expert witness, was not considered by the trial court, even through under L.R. 21.1, Dr. Miller would have been able to testify at trial provided his report was submitted to CWRU thirty days in advance of trial, a point in time far removed from the date when the

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[4] Local Rule 21.1, entitled "Trial Witnesses," provides in relevant part:

> (B) A party may not call a non-party expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. It is counsel's responsibility to take reasonable measures, including the procurement of supplemental reports, to insure that each report adequately sets forth the non-party expert's opinion. However, unless good cause is shown, all supplemental reports must be supplied no later than thirty (30) days prior to trial. The report of a non-party expert must reflect his opinions as to each issue on which the expert will testify. A non-party expert will not be permitted to testify or provide opinions on issues not raised in his report.

Affidavit was submitted opposition her. See L.R. 21.1(B).

Further, "[a] party has an unconditional right to present rebuttal testimony on matters which are addressed in an opponent's case-in-chief and should not be brought in the rebutting party's case-in-chief." *Phung v. Waste Mgmt., Inc.*, 71 Ohio St. 3d 408, 644 N.E.2d 286 (1994). The affidavit of Dr. Stephen Miller, the substance of which was not considered at all by the trial court in determining CWRU's summary judgment motion, clearly falls into the category of rebuttal testimony. The trial court thus committed reversible error in not considering it. *See id.*; *Murphy v. Reynoldsburg, supra.*

CWRU's expert here, Dr. Monahan, advanced a theory that circumstances did not exist surrounding the shooting on CWRU's campus of Appellant's decedent by Biswanath Halder to have rendered it appropriate to conduct a forensic risk assessment of Halder. This theory was not essential to Appellant's case in chief and not essential to proving that that Halder's acts were foreseeable. Nonetheless, the trial court, in violation of L.R. 21.1 and this Court's precedent, would not permit Dr. Miller's Affidavit to be used to oppose CWRU's motion. This refusal was erroneous and also warrants reversal of the court of appeals' decision. *See Phung v. Waste Mgmt., Inc., supra; Murphy v. Reynoldsburg, supra.*

CONCLUSION

Petitioner requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

March 30, 2010

Respectfully submitted,

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APPENDIX

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APPENDIX A

[Cite as *Wallace v. Halder*, 2009-Ohio-3738.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

No. 92046

[Filed July 30, 2009]

BRIAN WALLACE, ADMINISTRATOR OF THE ESTATE OF NORMAN E. WALLACE

PLAINTIFF-APPELLANT

vs.

BISWANATII HALDER, ET AL.

DEFENDANTS-APPELLEES

JOURNAL ENTRY AND OPINION

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-591169

BEFORE: Celebrezze, J., Blackmon, P.J., and Stewart, J.

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JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Brian Wallace ("Wallace"), brings this appeal challenging the trial court's grant of summary judgment in favor of appellee, Case Western Reserve University ("CWRU"). After a thorough review of the record, and for the reasons set forth below, we affirm.

Background

{¶ 2} The lengthy sequence of events leading up to this appeal are extensive and require discussion. From 1996 to 1999, Biswanath Halder ("Halder") was enrolled as a graduate student at the CWRU Weatherhead School of Management. After his graduation in 1999, Halder continued his studies at CWRU by enrolling in the MBA-Plus program for the Fall 1999 and Spring 2000 semesters. As part of his

studies, he used the computer lab located in the Enterprise Building on CWRU's campus.

{¶ 3} Halder was known to cause problems in the computer lab. On occasion, Halder logged onto up to three computers in the lab at one time, thereby preventing computer access to other students. On another occasion, a female student complained that Halder was harassing her in the lab, insisting she proofread his personal documents. In July 2000, Halder allegedly discovered that his email account had been hacked into, and all his files had been deleted. Halder accused Shawn Miller ("Miller"), a computer technician employed by CWRU, as the individual who he believed had hacked into his computer and deleted his life's work. Halder made several complaints to CWRU personnel, including Roger Bielefeld, Director of Information Technology at the Weatherhead School of Management. A formal investigation was undertaken by CWRU personnel, but the matter remained unresolved as far as Halder was concerned.

{¶ 4} On August 29, 2000, Halder sent a mass email from his campus account to CWRU students and alumni, which laid out his accusations against Miller and CWRU. As a consequence, CWRU considered terminating Halder's university computer privileges permanently, but decided to wait until it was determined whether Halder would register for Fall 2000 classes. When Halder did not register for classes, his computer privileges automatically lapsed. The last known occasion that Halder used the CWRU computer system or was on campus was in August 2000.

{¶ 5} On June 7, 2001, Halder filed a civil lawsuit against Miller, alleging that Miller infiltrated his

computer account and deleted his files. CWRU assisted Miller by paying his attorney fees. While the matter was pending in the common pleas court, Phillip Helon, one of Halder's housemates, engaged in several conversations with Halder about the litigation and Halder's belief that Miller was the individual who infiltrated his computer files. In his deposition, Helon stated that Halder told him if he "lost his appeal," he would "f* * * those f* * *ers up." Helon stated that he told Miller about the vague threats because Halder had indicated to Helon that he believed Miller was behind the computer hacking.

{¶ 6} In Miller's deposition, he stated that he had talked to Bielefeld on a prior occasion about Halder and how other students in the computer lab complained about Halder's behavior. Miller also stated that when Helon told him what Halder said, Miller was concerned for his safety, although he was not immediately afraid because the pending lawsuit had not yet been resolved at the trial court level. Miller stated that he had discussed the problems relating to Halder with Bielefeld on several occasions.

{¶ 7} While Halder's lawsuit against Miller was pending, CWRU students and alumni received another mass email, allegedly from Halder's student account, which labeled Miller as "an evil man" and intimated that CWRU was "an evil empire." CWRU's investigation determined that the email was not sent from any CWRU computer account, and no determination was made that Halder was responsible for the email. Nonetheless, on November 29, 2001, Bielefeld and Julia Grant, Associate Dean of the Weatherhead School, sent Halder a letter officially terminating his computer privileges.

{¶ 8} Deposition testimony from several CWRU administrators indicates that they knew Halder was disruptive in the computer lab; that Halder had initiated an investigation when he believed his computer account had been infiltrated; that he had filed a civil lawsuit against Miller; and that Halder used spam emails to communicate his disappointment with the lack of cooperation he was receiving from CWRU. This testimony also indicated that no administrator had been made aware of Halder's continuing threats against Miller and CWRU after November 2001.

{¶ 9} In April 2003, Halder's appeal of his civil lawsuit against Miller was dismissed. Shortly after Miller learned that the appeal had been dismissed, he received two hang-ups on his home phone. Miller contacted the Cleveland Heights police, explained to them his concerns about Halder, and asked them to increase security on his street. Miller notified his immediate supervisor, Carleen Bobrowski, as well as Chris Fenton, another employee in the computer lab, of his concerns because Miller believed Fenton was involved with hacking into Halder's account. However, Miller testified, "I made no official appeal to anyone at CWRU for protection in regard to Biswanath Halder."

{¶ 10} On May 9, 2003, at approximately 4:00 p.m., Halder entered the Peter B. Lewis Weatherhead School of Management building by using a sledgehammer to break through a glass door. Halder proceeded to shoot and kill graduate student Norman Wallace, shoot and injure two other occupants of the building, and hold hostages in the building for approximately seven hours. Halder was later found guilty of the murder of Norman Wallace.

{¶ 11} On May 6, 2006,[1] Brian Wallace, as Administrator of the Estate of Norman E. Wallace, filed a lawsuit against Biswanath Halder, John Does 1 through 10, and CWRU. In his complaint, he alleged causes of action against CWRU for survivorship; wrongful death; and negligent hiring, supervision, and performance of CWRU security services. At the close of discovery, CWRU filed a motion for summary judgment, arguing that Wallace's theory of premises liability must fail as a matter of law because Halder's actions on May 9, 2003 were not reasonably foreseeable, and therefore, CWRU had no duty to protect Norman Wallace against Halder's criminal acts.

{¶ 12} In his brief in opposition to summary judgment, Wallace argued that several employees had knowledge of Halder's threats of violence against certain individuals and CWRU, that their knowledge is imputed to CWRU, and that CWRU breached its duty to Norman Wallace by not taking the threats Halder made seriously and providing better security. In support of his opposition, Wallace submitted expert reports from Ralph Witherspoon and Dr. Steven Miller.

{¶ 13} On August 27, 2008, the trial court granted summary judgment in favor of CWRU. It found that Halder's actions and statements did not "constitute 'somewhat overwhelming' facts and circumstances that a reasonably prudent person would foresee the probability that [Halder] would cause serious physical

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[1] Wallace filed a prior complaint on May 6, 2005, which was identical in substance to this complaint, filed a year later.

harm to others." On September 5, 2008, Wallace filed his notice of appeal, raising one assignment of error for our review.

Review and Analysis

{¶ 14} "I. The trial court erred when it granted the motion of appellee Case Western Reserve University for summary judgment."

{¶ 15} Wallace argues that Halder's actions were foreseeable, that CWRU is imputed with the knowledge of its employees, and that the court should not have excluded one of his expert reports.

Expert Report

{¶ 16} We first address whether the trial court properly excluded Dr. Steven Miller's expert report.

{¶ 17} After numerous extensions of time, the trial court imposed a final deadline of January 18, 2008 for submission of expert reports. As of that date, Wallace had submitted one expert report from Ralph Witherspoon. CWRU's motion for summary judgment was filed on February 1, 2008. On February 14, 2008, Wallace attempted to file an expert report prepared by Dr. Steven Miller. The trial court excluded the report as untimely filed. Wallace claims that the trial court abused its discretion by excluding the report and that, had the trial court considered Dr. Miller's report, it would not have granted summary judgment.

{¶ 18} Our standard of review on the admission of evidence is whether the trial court abused its discretion. *Barnett v. Sexten*, 10th Dist No. 05AP-871,

2006-Ohio-2271, citing *Dunkelberger v. Hay*, 10th Dist. No. 04AP-773, 2005-Ohio-3102. An "abuse of discretion" means more than an error of law or judgment. Rather, an abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

{¶ 19} Loc.R. 21.1(A) provides in pertinent part: "Each counsel shall exchange with all other counsel written reports of medical and expert witnesses expected to testify in advance of trial. The parties shall submit expert reports in accord with the time schedule established at the Case Management Conference. * * * Upon good cause shown, the court may grant the parties additional time within which to submit expert reports."

{¶ 20} Given the numerous extensions of time granted to the parties by the court,[2] we do not find that the trial court abused its discretion by excluding Dr. Miller's report.

{¶ 21} As such, the trial court should not have considered Dr. Miller's report in reviewing CWRU's motion for summary judgment. An expert report may properly be excluded for purposes of summary judgment where it has been excluded for trial as a discovery sanction. *Clarke v. Cleveland Clinic Foundation* (July 7, 1994), Cuyahoga App. No. 65749.

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[2] The original cutoff date for Wallace's expert report was August 1, 2007, and at least five extensions were granted at Wallace's request.

Foreseeability of Harm

{¶ 22} Next we address the trial court's grant of summary judgment on the basis that Halder's actions were not foreseeable, and CWRU did not owe Norman Wallace a duty greater than that of ordinary care.

{¶ 23} "Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 24} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 1992-Ohio-95, 604 N.E.2d 138.

{¶ 25} In *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, "the moving party bears the initial

responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim.*" Id. at 296. (Emphasis in original.) The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

{¶ 26} This court reviews the lower court's grant of summary judgment de novo. *Brown v. Scioto County Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party * * *. [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741, 607 N.E.2d 1140.

{¶ 27} Wallace asserts his claims against CWRU on a premises liability theory; that is, that CWRU should have foreseen the events of May 9, 2003 and acted to prevent the murder of Norman Wallace.

{¶ 28} "To recover on a negligence claim, a plaintiff must prove (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, and (3) that the breach of the duty proximately caused the plaintiff's injury." *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 1998-Ohio-184, 697 N.E.2d 198, reconsideration denied, 83 Ohio St.3d 1453, 700

N.E.2d 334, citing *Wellman v. E. Ohio Gas Co.* (1953), 160 Ohio St. 103, 108-109, 113 N.E.2d 629.

{¶ 29} "'Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff.'" *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, quoting *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, 98, 543 N.E.2d 1188. Whether a duty exists in a negligence action is a question of law for a court to determine. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265.

{¶ 30} "The duty element of negligence may be established by common law, by legislative enactment, or by the particular circumstances of a given case." *Wallace*, supra at ¶23; *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, 119 N.E.2d 440, paragraph one of the syllabus. The existence of a duty depends on foreseeability of harm. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 472 N.E.2d 707. "The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." Id.; see, also, *Wallace*, at ¶23. Foreseeability of harm usually depends on a defendant's knowledge. *Menifee*, at 77.

{¶ 31} Under Ohio common law of premises liability, the status of the person who enters upon the land of another – specifically, trespasser, licensee, or invitee – defines the scope of the legal duty that a landowner owes the entrant. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312,

315, 1996-Ohio-137, 662 N.E.2d 287, reconsideration denied, 75 Ohio St.3d 1452, 663 N.E.2d 333, citing *Shump v. First Continental-Robinwood Assocs.*, 71 Ohio St.3d 414, 417, 1994-Ohio-427, 644 N.E.2d 291. "[I]nvitees are persons who rightfully come upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner." *Gladon*, at 315.

{¶ 32} In *Kleisch v. Cleveland State Univ.*, Franklin App. No. 05AP-289, 2006-Ohio-1300, the Tenth District concluded that a university student who was raped while studying in a classroom on university property was afforded the status of an invitee, and therefore, the university owed her a duty to exercise ordinary care and protection by maintaining the premises in a safe condition. See, also, *Baldauf v. Kent State Univ.* (1988), 49 Ohio App.3d 46, 47, 550 N.E.2d 517; *Bennett v. Stanley*, 92 Ohio St.3d 35, 38, 2001-Ohio-128, 748 N.E.2d 41.

{¶ 33} In *Reitz v. May Co. Dept. Stores* (1990), 66 Ohio App.3d 188, however, this court explained: "In addition to the totality of the circumstances presented, a court must be mindful of two other factors when evaluating whether a duty is owed * * *. The first is that a business is not an absolute insurer of the safety of its customers. The second is that criminal behavior of third persons is not predictable to any particular degree of certainty. It would be unreasonable, therefore, to hold a party liable for acts that are for the most part unforeseeable. Thus, the totality of the circumstances must be somewhat overwhelming before a business will be held to be on notice of and therefore under the duty to protect against the criminal acts of others."

{¶ 34} We find that Halder's actions on May 9, 2003 were not reasonably foreseeable such that CWRU was on notice of, and under a duty to protect, Norman Wallace from Halder's shooting rampage.

{¶ 35} According to CWRU employees and the information they had, with the exception of sending one mass email in August 2000, Halder was seeking redress through lawful and legitimate avenues. Halder had contacted CWRU administrators and internal computer security personnel with his hacking allegations. He had also filed a lawsuit against Miller, which was proceeding normally through the proper legal channels. Until the tragedy of May 9, 2003, Halder did not have a violent history and had no criminal record.

{¶ 36} Wallace points to the statements Halder made to his housemate, Phillip Helon, about CWRU and Miller; however, these statements do not amount to notice to CWRU. Even Miller testified that when Helon told him Halder seemed obsessed with Miller, Miller was not concerned for his safety and did not believe Halder would harm him. He stated that, at most, he thought Halder might do some property damage to CWRU. Furthermore, Miller was not afraid of Halder at that time because the lawsuit was still pending at the trial level when Halder made comments that he wanted to "stop" Miller.

{¶ 37} Wallace also focuses on Miller's earlier notice to Bielefeld and through Bielefeld to Grant. The testimony of Bielefeld and Grant does not support a finding that CWRU was on notice that Halder had made threats to harm anyone. Bielefeld and Grant knew Halder had caused some problems in the

computer lab in 1999 and 2000; they knew Halder had sent a mass email to CWRU students and alumni in August 2000; they knew Halder had a pending lawsuit against Miller; and, most significantly, they knew that Halder had had no contact with any CWRU employee since 2001.

{¶ **38**} While hindsight clearly suggests Bielefeld should have inquired further into Halder's alleged threats and activities after August 2000, as the trial court stated in its opinion, "the court must focus on the facts and circumstances at the time in which they arose and should refrain from using the additional illumination of hindsight in performing its analysis." Journal Entry and Opinion, p.8, citing *Hetrick v. Marion-Reserve Power Co.* (1943), 141 Ohio St. 347 ([N]egligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent people under the same circumstances would or should, in the exercise of reasonable care, have anticipated.)

{¶ **39**} Furthermore, CWRU did employ security personnel, and Halder did not lawfully enter the Peter B. Lewis building, but instead broke in by breaking though a glass door. We are also not convinced by Witherspoon's conclusion that, based on its knowledge, CWRU was required to put armed security guards in that or any other campus building.

{¶ **40**} We are persuaded that the lengthy gap between Halder's last contact with CWRU in August

2000[3] and the shooting death of Norman Wallace in May 2003 is another factor that prevents this court from finding that Halder's criminal act was reasonably foreseeable to CWRU. Under the totality of the circumstances available to CWRU personnel, the evidence is not "somewhat overwhelming" that Halder would embark on a shooting rampage on campus. We are also not convinced by Wallace's argument that CWRU failed to take Halder's accusations of computer hacking seriously, and therefore, somehow became responsible for his violent rage. Not everyone seeking redress for a grievance receives the justice they hope for; however, this does not entitle them to seek violent retribution and shift the blame from themselves.

{¶ 41} The facts before us are not "somewhat overwhelming" in creating in CWRU a duty to protect Norman Wallace from the tragic, yet unforeseeable, criminal shooting death at Halder's hands. We find that the trial court properly granted summary judgment in favor of CWRU, and we overrule Wallace's sole assignment of error.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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[3] We are not convinced that the spam email sent in November 2001 came from Halder since an investigation determined that it was not sent internally, and there was no evidence presented as to its origination.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA ANN BLACKMON, P.J., and MELODY J. STEWART, J., CONCUR

APPENDIX B

Court of Common Pleas of Ohio.
Cuyahoga County

No. CV-06-591169

[Filed August 27, 2008]

Brian WALLACE, etc., Plaintiff,	)
v.	)
Biswanath HALDER, et al., Defendants.	)

Journal Entry and Opinion

Dick Ambrose, Judge.

{¶ 1} Before the Court is the Motion for Summary Judgment filed by Defendant Case Western Reserve University ("CWRU"). Plaintiff Brian Wallace, Administrator of the Estate of Norman F. Wallace, filed his Brief in Opposition to Defendant's Motion for Summary Judgment on February 15, 2008. CWRU seeks summary judgment on Plaintiff's claims against it relating to the murder of Norman E. Wallace by Defendant Biswanath Halder on May 9, 2003 at CWRU's Weatherhead School of Management, Peter B. Lewis Building.

{¶ 2} Plaintiff's survivorship and wrongful death claims against CWRU are based on premises liability and negligent hiring, supervision and performance of security services that, according to Plaintiff, proximately led to the death of Norman Wallace. CWRU denies Plaintiff's claims stating that the actions of Defendant Halder on May 9, 2003 were not reasonably foreseeable and therefore, there was no duty to protect Norman Wallace against violent and unforeseeable acts. CWRU also claims that Plaintiff has no evidence that it was in any way negligent in hiring, supervising or performing security services at the Peter B. Lewis building on May 9, 2003.

{¶ 3} The issues in this case hinge on the foreseeability of harm to Plaintiff. If Defendant Halder's criminal act was not foreseeable, then CWRU does not have a duty to protect Plaintiff from that particular harm. In order to determine foreseeability, the court must examine the totality of the circumstances and determine whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or non-performance of an act. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. In the context of criminal acts, the forseeability of harm generally depends on a defendant's knowledge, which in turn, is determined from the totality of the circumstances. *Brown v. Campbell,* Cuyahoga App. Nos. 85698, 85702, 2005-Ohio-3855. In addition, the totality of the circumstances must be somewhat overwhelming before a business will be held to be on notice of and therefore under the duty to protect against the criminal acts of others. *Reitz v. May Company Department Store, et al. (1990),* 66 Ohio App.3d 188, 193-194.

{¶ 4} Plaintiff argues that Halder's actions were foreseeable based on, among other things, an alleged statement made by Phil Helon, a joint MBA and law student, to Shawn Miller, an assistant in the CWRU Weatherhead School of Management computer lab. In May or June 2002, Halder apparently told Helon that if he lost a civil appeal against Miller and CWRU, Halder would "fuck those fuckers up." Plaintiff alleges that Helon then reported this comment to Miller who, in turn, reported it to Roger Bielefield, one of Miller's supervisors at CWRU.

FACTUAL BACKGROUND

{¶ 5} Halder was a graduate student at CWRU's Weatherhead School when he first accused Miller of posting defamatory comments on his website's guestbook on June 14, 2000 and again on July 13, 2000. Halder also believed that Miller hacked into his Internet account and deleted files from his website on July 13, 2000. These allegations were eventually the subject of a civil lawsuit filed by Halder and which was subsequently dismissed when the Court granted summary judgment on September 26, 2002.[1]

{¶ 6} There is no dispute that Defendant Halder was known to the CWRU administration as a person who created problems in the CWRU computer lab. However, none of these problems involved acts or specific threats of violence. For example, from December 1999 to June of 2000, Shawn Miller testified that Halder was a frequent customer of the CWRU

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[1] Halder v. Miller, Cuyahoga County Court of Common Pleas, Case No. 441308.

computer lab, which was at that time housed at Enterprise Hall. The lab later moved to the Peter B. Lewis building in the summer of 2002. According to Miller, Halder was difficult to work with, sent spam e-mails, harassed, bothered and irritated people in the computer lab. Halder would leave personal belongings on as many as three computer workstations, thereby depriving other students the opportunity to use them. Halder also would ask students or computer lab personnel for assistance proofreading non-school related work. On one such occasion, Miller was asked to intervene on behalf of a female student who was uncomfortable when Halder imposed on her to review his work.

{¶ 7} When information on his website was deleted in July of 2000, Halder complained to Roger Bielefield, Director of information Technology at CWRU. In a July 13, 2000 letter to Bielefield, Halder accused Miller of leaving "malicious and libelous comments" on his website before someone broke into his CWRU computer account and deleted all his files.[2] Bielefield met with Halder and then spoke with Miller who denied Halder's allegations. Bielefield then communicated to Halder that, based on what he knew, he would not be carrying out any disciplinary action against Mr. Miller at that time. Halder then complained to David Kovacic, CWRU's Manager of Network Engineering and Michael Goliat, Investigator for CWRU's Security Department. After investigating Halder's allegations, Mr. Goliat determined that there

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[2] Halder was not enrolled as a student at CWRU at the time his website was compromised and was not enrolled at CWRU at any time beyond the Spring 2000 semester.

was a potential for felony charges and so referred the matter to local police. Halder then spoke with Lt. John Serrao of the University Circle Police Department who conducted a further investigation into the alleged hacking incident and learned that the hacking occurred through akp.net, an internet service provider whose server was located in downtown Cleveland. Lt. Serrao then turned the case over to Detective Arvin Clar of the Cleveland Police Department. Detective Clar undertook an investigation, but was unable to determine the identity of the person who deleted files from Halder's website. Detective Clar subpoenaed information from certain out-of-state websites (based on information provided to him by Halder). However, Detective Clar received no responses and eventually terminated his investigation.

{¶ 8} On August 27, 2000, Halder sent out a spam e-mail to former CWRU-MBA students telling them about the deletion of his files and calling Shawn Miller an "evil man." Halder also placed a header on pages within his website stating: "unless society destroys the evil man, the evil man will destroy society." In June of 2001, Halder hired an attorney to file a civil lawsuit against Miller, whom he believed was the person responsible for deleting files from his website. On November 21, 2001, another spam e-mail was sent from Halder's CWRU computer account again identifying Shawn Miller as "an evil man." The e-mail at one point mentioned that the "evil man" needed to be destroyed. A subsequent investigation by CWRU's Information Technology department revealed that this e-mail was a "spoof made to appear as if it was from Halder's account when, in fact, it had originated from outside the University. A few days later, the school terminated Halder's e-mail account with CWRU.

{¶ 9} During the 2001-2002 time frame, Halder had conversations with Phillip Helon, a joint MBA and law student at CWRU, concerning the deletion of his computer account and issues he was facing in his lawsuit against Miller. Halder told Helon that: "evil people need to be liquidated or liquefied." In June 2002, while the civil suit against Miller was pending, Halder apparently told Helon that if he lost his appeal he would "fuck those fuckers up."[3] This threat was then repeated to Shawn Miller and communicated by Miller to his supervisor, Roger Bielefield. Plaintiff also alleges that at the time Halder made this statement, he made a gun gesture with his thumb and forefinger.[4]

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[3] There is a dispute over whether Halder said these exact words to Helon. At the time at which these remarks are attributed to Halder, Halder's civil case had not yet been dismissed, so there was no appeal pending. Also, in Helon's deposition, there is no mention of these words. In addition, Halder denied ever making such remarks. For purposes of summary judgment only, and construing the evidence most strongly in favor of the non-moving party, the Court will accept Plaintiff's version of the facts that Halder said he would "fuck those fuckers up" if he lost his appeal.

[4] At his deposition, Miller was not sure if Helon made a gun gesture when relating to Miller what Halder said. Phil Helon never testified that Halder made a gun gesture and further testified at deposition that no specific threats were ever made by Halder. In his testimony at Halder's criminal trial, Miller never mentioned the gun gesture and at his deposition, did not recall relating the gun gesture to Roger Bielefield when they spoke about Halder in June of 2002. Construing the evidence most strongly in favor of the non-moving party, the Court can accept, for purposes of summary judgment, that Halder made the alleged finger gesture when telling Helon that he was going to "fuck those fuckers up." However, since Miller could not testify affirmatively that he communicated the gesture to Bielefield, the Court will

At Halder's criminal trial, Miller testified that he told Bielefield that "apparently Halder was interested in killing us."[5] Bielefield told Miller that he (Halder) probably wouldn't do anything and not to worry about it. Another threat by Halder was apparently communicated to another law student, Brandon Hudson, during a discussion about the possibility of Halder losing his appeal. According to Hudson, Halder said "he would kill them. The people who were responsible for this." However, Mr. Hudson also testified at Halder's criminal trial that he never spoke to Phil Helon about a warning to Shawn Miller. In addition, there is no evidence that Hudson reported this threat by Halder to CWRU or its representatives at any time.

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only consider CWRU to be informed of Halder's alleged statement, but not the hand gesture.

[5] This point is also disputed by the parties. Defendant contests Plaintiff's representation that Miller told Bielefield that Halder wanted to kill them. Contrary to his testimony at the criminal trial, in his deposition in this case, Miller did not believe that he said these exact words to Bielefield but instead expressed concern to Bielefield that Halder "might do something crazy." At his deposition, Bielefield did not recall these comments and stated that Miller never communicated to him a concern for his safety. Also, there was only one conversation between Miller and Bielefield regarding Halder and this took place in the Spring of 2002, almost a year prior to the shooting on campus. Phil Helon denied that Halder made any direct threats against anyone, nor did he make specific threats towards Miller. In addition, in his responses to Request for Admissions, Halder denied he ever told anyone that: "he wanted to kill someone." Since there was testimony at the criminal trial to support Plaintiff's contention on this point, the Court will assume, for purposes of summary judgment, this statement was made by Miller to Bielefield in the Spring of 2002.

{¶10} After learning that Halder had lost his appeal,[6] Miller received two "hang up" phone calls at his residence and so he called the Cleveland Heights Police with a general concern for his safety. He testified that he "probably" asked the police about his concerns and statements made by Halder. According to Miller, the police did not have grounds to do anything but agreed to increase patrols around his house. Miller was not sure if he reported this to Carleen Bobrowski or anyone else in the administration level at CWRU. Miller also testified that, after he received these hang up phone calls, he did not indicate any concern to CWRU that Halder was going to harm him, nor did he request CWRU to provide him with protection from Halder.

{(11} In May of 2003, security on CWRU's campus was provided by unarmed security officers who were trained to call local police in the event of a confrontation with an armed suspect. A campus security officer was on duty at the Peter B. Lewis building on the night when Norman Wallace was shot. The building was a secured building, requiring a key card for entry, and was equipped with an internal and external digital camera surveillance system. Halder gained entry to the building by breaking a glass door with a sledgehammer.

LAW & ANALYSIS

({12} Before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the

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[6] Halder's appeal was dismissed on April 29, 2003.

moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Dussell v. Lakewood Police Dept.*, Ohio St.3d 299, 300-301, 2003-Ohio-3652, citing *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 1996-Ohio-326. A motion for summary judgment forces the nonmoving party to produce evidence on any issue for which the party bears the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, paragraph three of the syllabus (*Celotex v. Catrett* [1986], 477 U.S. 317, approved and followed).

{¶13} Plaintiff's claims in this case are based on the law of negligence. Actionable negligence requires the showing of a duty, the breach of that duty and an injury proximately resulting therefrom. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. Under Ohio law, ordinarily no duty exists to prevent a third person from harming another unless a "special relationship" exists between the actor and the other. *Gelbman v. Second Natl. Bank of Warren* (1984), 9 Ohio St.3d 77. Such a "special relationship" exists between a business and its business invitees. *Reitz v. May Co. Dept. Stores* (1990), 66 Ohio App.3d 188. Thus, a business may be subject to liability for harm caused to a business invitee by the criminal conduct of third persons. *Howard v. Rogers* (1969), 19 Ohio St. 2d 42; *Taylor v. Dixon* (1982), 8 Ohio App.3d 161. These principles apply, by analogy, to a university and its students. In this context, the university is considered the owner of the premises and the student its invitee. See, *Kleisch v. Cleveland State Univ.*, Franklin App.

No. 05AP-289, 2006-Ohio-1300. Nonetheless, a business is not an insurer of the safety of its business invitees while they are on its premises. *Rogers,* supra, at paragraph two of the syllabus. Consequently, a business has a duty to warn or protect its business invitees from criminal acts of third persons only where the business knows or should know in the exercise of ordinary care that such acts present a danger to its business invitees. *Id.* at paragraph three of the syllabus; *Reitz,* supra, at 191.

{¶14} Whether CWRU had a duty to protect Norman Wallace from the harm suffered in this case turns upon whether the attack upon him was reasonably foreseeable. The test for determining whether or not a criminal act is foreseeable is whether, under the totality of the circumstances, a reasonably prudent person would anticipate that injury was likely to occur. *Kleisch,* supra, at ¶23-26; *Reitz,* supra, at 192. The totality of the circumstances test considers prior similar incidents, the propensity for criminal activity to occur on or near the location of the business, and the character of the business. *Kleisch* at ¶23. Because criminal acts are largely unpredictable, the totality of the circumstances must be "somewhat overwhelming" in order to create a duty. *Reitz,* supra, at 194. Of course, in performing its review, the Court must focus on the facts and circumstances at the time in which they arose and should refrain from using the additional illumination of hindsight in performing its analysis.[7]

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[7] "Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be

{¶15} Plaintiff goes into great detail in his Opposition Brief to describe multiple incidents of Halder's behavior and how he was considered a social outcast and recluse with no family or friends and who lived in a messy attic in Cleveland's Little Italy neighborhood. Halder was also described as a person who was unpleasant to deal with, aggressive, non-compliant and problematic. Plaintiff also mentions that one student[8] in Halder's study group said that he gave her "the creeps."

{¶16} There is no question that CWRU was aware of issues with Halder. Roger Bielefield mentioned this in an e-mail to Cynthia Grant referring to the "Biswanath Halder Problem." However, because CWRU was aware of an annoying and unpleasant person on campus does not, without more, equate to foreseeability that this same person would someday

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judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated. Reasonable anticipation is that expectation created in the mind of the ordinarily prudent and competent person as the consequence of his reaction to any given set of circumstances. If such expectation carries recognition that the given set of circumstances is suggestive of danger, then failure to take appropriate safety measures constitutes negligence. On the contrary, there is no duty to guard when there is no danger reasonably to be apprehended. Negligence is gauged by the ability to anticipate. Precaution is a duty only so far as there is reason for apprehension. Reasonable apprehension does not include anticipation of every conceivable injury. There is no duty to guard against remote and doubtful dangers." *Hetrick v. Marion-Reserve Power Co.* (1943), 141 Ohio St. 347, 358-359.

[8] Identified as Kathryn Robakowski.

make a forced entry into a secured building on campus with a semi-automatic rifle and pistol and then shoot the first person he happened to see. Plaintiff focuses the Court on several statements allegedly made by Halder as evidence that Halder was dangerous. As a result, Plaintiff argues, CWRU should have foreseen that Halder would cause harm to others, and that despite this knowledge, proper measures were not taken to avoid such harm.

{¶17} First, there were the statements published in e-mails and correspondence from Halder calling Shawn Miller an "evil man" and stating that "evil people need to be liquidated or liquefied." There was also the reference on Halder's website that "unless society destroys the evil man, the evil man will destroy society." Next, is the conditional threat Halder made to Phil Helon that if he lost his appeal, he would "fuck those fuckers up!" This statement was allegedly repeated by Helon to Shawn Miller and then reported to Roger Bielefield along with Miller's additional comment that: "apparently Halder is interested in killing us." Finally, there is the statement Halder apparently made to Brandon Hudson, but which was never reported by Hudson to anyone at CWRU, that Halder "would kill them" meaning "the people who were responsible for this" if he lost his appeal.

({118} This last statement was not communicated to anyone in a position of responsibility at CWRU, and therefore it cannot be considered as part of the "somewhat overwhelming" circumstances necessary for the Court to find that the harm to Norman Wallace was foreseeable. The initial statements made in e-mails and correspondence received by CWRU were equivocal, general in nature and cannot be construed

as stating a direct threat against anyone. Therefore, these statements alone are not sufficient to place CWRU on notice of foreseeable harm. This is especially true given the fact that they were made during the summer of 2000, almost three years before the murder of Norman Wallace.

{¶19} The most compelling evidence of a threat allegedly communicated to CWRU was Halder's statement to Phil Helon that he would "fuck those fuckers up." A statement apparently bolstered by Halder's hand gesture mimicking a gun. However, Miller never testified concerning this hand gesture at Halder's criminal trial and could not recall if he ever communicated it to Bielefield. This is contrasted with Bielefield's testimony that Miller never communicated any safety concerns to him. Plaintiff's evidence on this point is simply not competent and cannot be considered a fact for purposes of summary judgment. In the same manner, the Court finds that because Miller testified with more certainty about Halder's "fuck those fuckers up" statement and testified at Halder's criminal trial that he told Bielefield: "apparently Halder was interested in killing us", these statements may be considered as facts for the purpose of summary judgment. Bielefield's response to these statements was to tell Miller not to worry and that Halder probably would not do anything. The question then is whether these actions and statements by Halder constitute "somewhat overwhelming" facts and circumstances such that a reasonably prudent person would foresee the probability that he would cause serious physical harm to others?

OPINION

{¶20} The Court must answer this inquiry in the negative. The facts and circumstances which form the chronology of events involving Halder and CWRU are not "somewhat overwhelming" and do not create a duty on the part of CWRU to protect against Halder's criminal actions on May 9, 2003. The facts indicate that after the computer hacking incident and Halder's subsequent departure from CWRU's campus in August of 2000, there were no contacts between Halder and CWRU personnel. The only real "threat" from Halder comes in the form of an off-campus, hearsay[9] statement in June 2002, which occurred ten months prior to the on-campus shooting. Also, while on CWRU's campus, Halder frequented the CWRU computer lab at Enterprise Hall. This lab was moved to the Peter B. Lewis building in the summer of 2002, almost two years after Halder had left campus. There is no evidence to suggest that Halder ever set foot in the Peter B. Lewis Building prior to May 9, 2003.

{¶21} Plaintiff's security expert, Ralph Witherspoon, opines that CWRU was negligent in its failure to adjust security at the Peter B. Lewis building to deter or prevent Halder from entering and assaulting persons within and that CWRU should have had an armed guard in the lobby of the building. However,

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[9] The reference to "hearsay" does not connote the Court's legal ruling regarding Halder's statement that he will: "fuck those fuckers up". To be clear, the Court considers that statement to be non-hearsay as it would not be offered for the truth of the matter asserted but would instead indicate the mental state of Shawn Miller and whether he perceived the information relayed to him by Phil Helon as a legitimate threat to his safety.

Plaintiff's expert provides no basis for the conclusion that this would have discouraged Halder from the actions he took on May 9, 2003. Plaintiff's expert also provides no basis for Plaintiff's claim that CWRU was negligent in its hiring or training of security officers. Plaintiff's expert concludes that CWRU is at fault because it failed to take any action to administratively or civilly resolve Halder's dispute with CWRU. However, such opinion is conclusory, unsupported by the facts and is beyond the scope of Mr. Witherspoon's expertise. Plaintiff also offered the opinion of Dr. Steven Miller, a forensic and clinical psychologist, to support Plaintiff's contention that CWRU knew that Halder was a pot about to boil over and did nothing about it. However, Plaintiff's expert report on this issue was excluded by the Court as untimely and therefore cannot be used as support for this theory of liability.

{¶22} Plaintiff attempts to distinguish the cases cited by Defendant where the courts found no foreseeabily (and thus no duty) by noting that the violent attackers in those cases were unknown to the university, while Halder was a known problem to the university. As stated above, there is no doubt that CWRU considered Halder a problem. CWRU was aware that Halder was annoying to students and personnel at the Weatherhead School's computer lab and that he was upset by the deletion of his website in June of 2000. CWRU was also aware that Halder was "on a mission" to find the culprit and/or prove that Shawn Miller hacked into his site and deleted all of his files. However, it is equally apparent that Halder had no history of violence or criminal behavior on or off campus. That before May 9, 2003, Halder had not been a student at CWRU since spring of 2000 and had not

been on CWRU's campus for over two and a half years before the shooting.[10] For approximately three years prior to the shooting, other than violating University policy by sending spam e-mails about Shawn Miller, "an evil man", Halder's response to the injustice against him (i.e. the deletion of his website) was through acceptable, legal channels available to him. In addition, Halder was not known to possess a gun or the means to carry out the only perceived threat in this litigation - i.e. to "fuck those fuckers up" if he lost his appeal. Even if that statement was accompanied with a hand gesture indicating a pistol, its significance is diminished by the fact that it occurred some 10 months before the murder of Brian Wallace.

{¶ 23} Without the benefit of a hindsight analysis, the words and actions of Biswanath Halder prior to May 9, 2003, tend to be "somewhat equivocal" rather than "somewhat overwhelming" as is required to establish the foreseeability of criminal conduct in a premises liability case. Halder's actions before May 9, 2003 are not sufficient to lead a reasonable person to foresee that, if he lost his appeal, his next course of action would be to heavily arm himself, force his way into a secure campus facility and then open fire on innocent persons.

{¶ 24} In light of the foregoing and Plaintiff's burden to establish foreseeability of harm through the totality of facts and circumstances that are "somewhat

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[10] Halder's own Response to Request for Admissions indicate that he stopped using the computer labs on the CWRU campus on a regular basis on July 13, 2000 and used the lab for the last time on August 6, 2000.

overwhelming," the Court finds that there are no genuine issues of material fact and that the Defendant is entitled to judgment as a matter of law on all of Plaintiff's claims. Defendant CWRU's Motion for Summary Judgment is therefore granted. Since this ruling does not dispose of all claims in this case, the Court specifically finds that there is no just cause for delay.

IT IS SO ORDERED

DATE:8-27-08

/s/

JUDGE DICK AMBROSE

APPENDIX C

The Supreme Court of Ohio

Case No. 2009-1817

[Filed December 30, 2009]

Brian Wallace, Administrator of The Estate of Norman E. Wallace	)
v.	)
Biswanath Halder, et al.	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

(Cuyahoga County Court of Appeals; No. 92046)

/s/ Thomas Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX D

U.S. Constitution: Seventh Amendment

Seventh Amendment - Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

APPENDIX E

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.